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Ex Parte

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: ***Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications nor a Telecommunications Service*, WC Docket No. 03-45; and *Vonage Holdings Corporation's Petition for a Declaratory Ruling*, WC Docket No. 03-211**

Dear Ms. Dortch:

As Verizon has already explained in its Comments and in recent ex parte filings,[1] it strongly supports the view that true voice over Internet protocol ("VoIP") services ought not to be subject to the full range of common-carrier regulation that applies to the traditional telephone network. To that end, the Commission should declare in response to the captioned petitions that these services are jurisdictionally interstate in order to prevent the development of a patchwork of inconsistent and potentially burdensome state regulations. The Commission should *not*, however, find that the services at issue in these petitions are "information services." In the case of pulver.com's petition, the issue is not even presented by the petition, need not be reached in any event, and classifying its service as an information service could have adverse and unintended consequences. And in the case of Vonage, the law is clear that its service is not an information service.

1. *These are interstate services.* Both pulver.com's Free World Dialup and Vonage's DigitalVoice services are interstate in nature, and the Commission should preempt state regulation of these and other VoIP services. The Commission has ample authority to preempt any state and local attempts at regulating these services, just as it has preempted state regulation

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[1] *See, e.g.*, Ex Parte Letter from Kathleen Grillo, Verizon, to Marlene H. Dortch, FCC, WC Docket Nos. 02-361, 03-266, 03-211 & 03-45 (Jan. 22, 2004) ("Verizon White Paper").

in other areas, such as CPE and special access. As a general matter, preemption of state regulation is permissible when a matter is entirely interstate or: "(1) the matter to be regulated has both interstate and intrastate aspects; (2) FCC preemption is necessary to protect a valid federal regulatory objective; and (3) state regulation 'would negate[] the exercise by the FCC of its own lawful authority' because regulation of the interstate aspects of the matter cannot be 'unbundled' from regulation of the intrastate aspects."[2] Moreover, under *California v. FCC*, 39 F.3d 919 (9th Cir. 1994), the Commission has authority to preempt even purely intrastate state regulation when the state regulation cannot feasibly coexist with the federal regulation.[3]

The Commission has authority to pre-empt state and local regulation of VoIP services because a substantial portion of the traffic is necessarily interstate, and the traffic cannot be reliably separated into interstate and intrastate components. The *Cable Modem Declaratory Ruling* classified cable modem service as interstate, recognizing that "an examination of the location of the points among which cable modem service communications travel" reveals that the points "are often in different states and countries."[4] The Commission also has classified DSL service used to provide Internet access as interstate for the same reason.[5] And it has long treated special access or private lines as interstate so long as interstate traffic constitutes more than 10 percent of the total traffic on the line.[6] It is inconceivable, given how their services are marketed and used, that pulver.com, Vonage or other VoIP services would fail to satisfy this threshold.

More importantly, it is impossible to separate Internet traffic into intrastate and interstate categories.[7] This is because the caller's physical location does not necessarily bear any

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[2] *Public Serv. Comm'n v. FCC*, 909 F.2d 1510, 1515 (D.C. Cir. 1990) (citations omitted).

[3] *See also Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 375-76 n.4 (1986) (FCC may preempt state regulation of intrastate telecommunications matters when (1) it is impossible to separate the interstate and intrastate components of the Commission's regulation, and (2) the state regulation would negate the Commission's lawful authority over interstate communication).

[4] *See* Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798, ¶ 59 (2002), *vacated in part on other grounds*, *Brand X Internet Servs v. FCC*, 345 F.3d 1120 (9th Cir. 2003).

[5] *See* Memorandum Opinion and Order, *GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148*, 13 FCC Rcd 22466, 22466, ¶ 1 (1998) (concluding that DSL service, "which permits Internet Service Providers (ISPs) to provide their end user customers with high-speed access to the Internet, is an interstate service and is properly tariffed at the federal level").

[6] *See* 47 C.F.R. § 36.154(a).

[7] *See* Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996: Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151, 9175, ¶52 (2001) ("[A]lthough some traffic destined for information service providers (including ISPs) may be intrastate, the interstate and intrastate components cannot be reliably separated. Thus, ISP traffic is properly classified as interstate, and it falls under the Commission's section 201 jurisdiction.") (footnotes omitted).

relationship to the identifying "number" assigned by the service. According to Vonage, it has no way of accurately determining where a particular customer is located when the customer uses its service; because computers are portable, Vonage's customers can use the service wherever they can plug into an Ethernet port connected to a broadband Internet connection. *See* Vonage Petition at 28. Moreover, customers with billing addresses in one state may be assigned a telephone number associated with another state. *Id.* at 29. Because it is impossible to separate the interstate and intrastate components of VoIP services, states purporting to regulate only the intrastate components would effectively negate the exercise by the FCC of its own lawful authority. Preemption is essential if the FCC's deregulatory approach to this traffic is to have any practical impact.

2. *The Commission should not subject VoIP services to the economic regulation that applies to traditional services but need not, and should not, classify the services at issue here as "information services."* True voice over Internet protocol services should not be subject to common-carrier regulation under Title II, but the Commission need not decide that these are "information services" in order to accomplish that goal. Under the Commission's precedents, in determining whether to require that a service be offered on a common-carrier basis, the decisive question is whether such a requirement is needed in order to prevent the exercise of market power. The Commission has explained that the "public interest requires common carrier operation" of facilities only where the incumbent operator "has sufficient market power to warrant regulatory treatment as a common carrier."[8] Accordingly, the Commission need not, and should not declare the services at issue in these petitions to be information services in order to apply a largely deregulatory policy to these services. Moreover, as addressed below, on the present record, it does not appear that either of these services could properly be classified as information services in any event.

The Commission should also clarify, in response to these petitions, those circumstances in which originating and terminating access charges apply to these services under current law. Specifically, if a call originates in IP format over a broadband connection, no originating interstate access charges should apply. Similarly, if a call terminates in IP format over a broadband connection, then no terminating access charges should apply. Of course, to the extent that the call either originates or terminates on the public switched telephone network, it would be appropriate for the local exchange carrier to assess the relevant interstate access charge. Indeed,

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[8] *AT&T Submarine Systems, Inc.*, 13 FCC Rcd at 21589, ¶ 9; *see also, e.g.*, Memorandum Opinion, Declaratory Ruling, and Order, *Cox Cable Communications, Inc., Commline, Inc. and Cox DTS, Inc.*, 102 F.C.C.2d 110, 121-22, ¶¶ 26-27 (1985) (finding no "compelling reason" to impose common carrier regulation on a carrier that had "little or no market power"); *see generally* Michael Kende, Office of Plans and Policy, FCC, *The Digital Handshake: Connecting Internet Backbones* at 12 (OPP Working Paper No. 32, Sept. 2000) (common carrier regulation "serve[s] to protect against anti-competitive behavior by telecommunications providers with market power. In markets where competition can act in place of regulation as the means to protect consumers from the exercise of market power, the Commission has long chosen to abstain from imposing regulation.").

the existing rules are clear that access charges apply to any "interstate or foreign telecommunication" that "use local exchange switching facilities." 47 C.F.R § 69.2(b), 69.5.

a. Pulver.com. As an initial matter, pulver.com does not even claim that its service is an "information service."[9] In its petition for declaratory ruling, pulver.com specifically argued that its Free World Dialup service "falls outside the definition of an information service." Pulver.com Petition at 6 n.9. It reiterated the point in a subsequent ex parte letter, recognizing that "the information service classification appears inappropriate" but that, in any case, "it does not seek an affirmative ruling that [Free World Dialup] is an information service."[10] The question whether the Free World Dialup services qualifies as an information service, therefore, is not even presented in pulver.com's petition, and this Commission has no reason to reach that question. Nor is there any need to declare the service an information service. The Commission can declare pulver.com's service to be interstate without classifying it as an information service, and can make clear that access charges do not apply only to the extent pulver.com's service originates and terminates over a broadband connection.

In any case, there are serious questions whether these services satisfy the definition of "information services," and none of the theories that the parties have advanced supports such a classification. The Act defines "[i]nformation service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[11] Nothing is generated, stored, transformed, processed, or retrieved when two pulver.com (and/or Vonage) customers speak to each other over the Internet. Just like a traditional telephone conversation, the end users transmit information of their own choosing, "without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43).

The Commission made this precise point in its 1998 *Report to Congress*:

> From a functional standpoint, users of these services obtain only voice transmission, rather than information services such as access to stored files. The provider does not offer a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information. Thus, the record currently before us suggests that this type of IP telephony lacks the characteristics that would render them "information services" within the meaning of the statute, and instead bear the characteristics of "telecommunications services."

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[9] Vonage makes the related point that preemption is justified regardless of whether its service is considered an information service or a telecommunications service under Federal law, "so the Commission need not resolve that question at this time." Vonage Petition at 28.

[10] Ex Parte Letter from Susan M. Hafeli, Shaw Pittman LLP, on behalf of pulver.com, to Marlene H. Dortch, FCC, at 4 (Dec. 11, 2003).

[11] 47 U.S.C. § 153(20).

Report to Congress ¶ 89 (footnote omitted).[12]

The fact that pulver.com uses a "name and presence database" ("NPD") does not convert its service into an information service. Pulver.com uses an NPD to list its subscribers and to keep track of whether or not they are "on line." When subscribers sign on to the service, the NPD keeps track of their current, real-time Internet Protocol addresses, thereby allowing other subscribers to reach them. The NPD simply provides a function that allows users to communicate with the network and to manage their telephone services. As an initial matter, even if this one feature could be classified as an information service, that would not change the entire call into an information service. In addition, the Commission has long recognized that "processing in connection with communications between an end-user and the network itself (*e.g.*, for initiation, *routing*, and termination of calls) rather than between or among users" qualifies as a telecommunications service.[13] Consistent with this understanding, Congress explicitly excluded from the definition of "information service" any use of computer capability "for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. § 153(20). The NPD functions in much the same way as network control signaling in connection with call forwarding or other signaling or services that allow the network to know when a line is busy so that it can reroute the call. Likewise, wireless carriers employ features that allow them properly to route calls to customers who are on the move, yet the calls themselves are clearly telecommunications. If a feature that allows the service provider to keep track of a customer's location for purposes of routing calls is sufficient to convert standard wire calls to information services, therefore, then essentially all wireless calls and many wireline services also must be treated as information services exempt from federal or state regulation.

Moreover, the peer-to-peer nature of pulver.com's service does not alter the fact that the form and content of the caller's choosing are being transmitted without change. Pulver.com allows its subscribers to transmit voice directly to one another without having to go through some concentrated and centralized facility, and pulver.com's service operates over the Internet's transmission facilities. The fact that pulver.com does not, itself, provide the underlying transmission is irrelevant. *See US West Communications, Inc. v. FCC*, 177 F.3d 1057 (D.C. Cir. 1999) (holding that a Bell Company "provides" long-distance service even though it is only

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[12] Report to Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, ¶¶ 33, 39, 45-49 (1998) ("*Report to Congress*");

[13] *Report to Congress* ¶ 50 n.106 (emphasis added) (citing First Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 FCC Rcd 21905, 21958, ¶ 107 (1996); Memorandum Opinion and Order, *Independent Data Communications Manufacturers Association Petition for Declaratory Ruling that AT&T's InterSpan Frame Relay Service is a Basic Service*, 10 FCC Rcd 13717, 13719 (1995) ("*Frame Relay Order*"); Report and Order, *Amendment to Sections 64.702 of the Commission's Rules and Regulations*, 2 FCC Rcd 3072, 3081-82, ¶¶ 64-71 (1987) ("*Computer III Phase II Order*") *vacated on other grounds by California v. FCC*, 905 F.2d 1217 (9th Cir. 1990)).

marketing the long-distance service of another). On the contrary, no one would claim that a typical reseller is not providing telecommunications simply because it uses someone else's facilities. The fact is that pulver.com's service allows its customers to transmit voice telephone calls to one another, and pulver.com therefore is providing a transmission service, within the meaning of the Act, regardless of whose facilities it uses.

In addition, the fact that pulver.com does not currently charge for its Free World Dialup service is only relevant, if at all, for purposes of arguing that it is a form of "telecommunications" but not a "telecommunications *service*." It makes no difference to the question whether pulver.com's service qualifies as an "information service" that it does not offer the service "for a fee." In any case, pulver.com uses its free service as a means of advertising and promoting its "Voice on the Net" conferences, for which it charges approximately two thousand dollars.[14] A cable company that offers a bundled package of cable television, cable modem service, and telephone service, for example, is offering a "telecommunications service" even though it may set the price for its telephone service at zero.

b. Vonage. Current law makes clear that Vonage's DigitalVoice service is not an information service either.

As an initial matter, the mere fact that Vonage's service is transmitted in IP protocol over one or more leg does not, itself, make it an information service. On the contrary, as we have explained at length elsewhere, IP is merely one form of packet switching protocol, and its use does not transform the call into an information service.[15]

Moreover, the fact that Vonage's service may originate on a broadband connection in IP protocol, and has to be converted to a different format to terminate over the public switched network likewise does not make it an information service. The Commission has held that even "net" protocol conversions necessitated by the introduction of new technology into transmission networks are considered "basic" telecommunications services rather than "enhanced" information services.[16] These conversions typically are required when innovative technology is introduced into the network piecemeal, and conversions are required to maintain compatibility with existing equipment. When carriers introduced digital facilities into their networks, for example, they were frequently required to convert the calls from analog to digital or vice versa to complete calls to customers served by differing technologies. Such protocol conversions did not convert the communication into an "information service." In the current context, this exception would apply, for example, where a call is originated in IP format, but is converted into TDM format at a gateway for termination over a LECs circuit switched network in order to maintain compatibility with the LEC's network and the terminating customer's CPE.

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[14] *See* <http://pulver.com/von/register.html> (visited February 4, 2004).

[15] *See* Verizon White Paper at 7-8.

[16] *See, e.g., Computer III Phase II Order*, 2 FCC Rcd at 3072, ¶ 70 (1987); *Fram Relay Order*, 10 FCC Rcd at 13717, ¶ 15.

3. *Any decision to treat Free World Dialup or DigitalVoice as "information services" could have significant, adverse consequences.* The law enforcement community has recently expressed concerns that the regulatory treatment of VoIP services should not interfere with CALEA's application to those services. For our part,[17] Verizon is already taking steps to ensure that its own network-based VoIP services will be accessible to law enforcement. But while Verizon is working diligently to deliver CALEA capabilities for its own network-based VoIP services, it cannot reasonably achieve CALEA capabilities for the services of other VoIP providers that may traverse its network. In cases where Verizon is not the VoIP application provider, but instead is merely providing the underlying transport service (*e.g.*, DSL) used in connection with a non-affiliated VoIP provider, Verizon often cannot determine what type of communication and information (*e.g.*, voice, data, content, signalling) is being transmitted. In such cases, it is not clear how or if the underlying transport provider can isolate the information about a VoIP communication. If CALEA is to fulfill its function of ensuring that law enforcement officials have the technical means to intercept wire and electronic communications and to access call-identifying information, then it must apply to *all* providers of such services, including cable companies and others – such as pulver.com and Vonage – that offer broadband transmissions of voice communications. Therefore, the Commission should make clear in addressing the petitions at issue here that other providers of VoIP services must comply with CALEA's capability requirements with respect to their own services. Otherwise, criminals will be able to avoid surveillance by simply using voice over Internet protocol to communicate rather than the traditional telephone network.

Classifying either of the services at issue here as an information service, however, would complicate the Commission's ability to apply CALEA. This is so because CALEA, by its express terms, does not apply to persons insofar as they are engaged in providing "information services." 47 U.S.C. § 1002(b)(2)(A). While each of these providers offers a transmission service that might be reached under CALEA's unique definition of the entities that are subject to CALEA, classifying some aspect of their service as an information service nonetheless complicates matters. In any event, as explained above, there is no need to classify pulver.com's and Vonage's services as information services, and the issue it not even presented by pulver.com's petition. And the potential adverse consequences of classifying those services as information services is all the more reason not to do so.

In addition to concerns about the applicability of CALEA, any decision that these are "information services" could undermine the ability of public-safety personnel to obtain access to necessary information in order to respond to emergency 911 calls. Moreover, classifying these services as "information services" calls into question the obligation of pulver.com and Vonage to contribute to universal services support, thereby creating an opportunity for regulatory arbitrage and further undermining current funding mechanisms.

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[17] *See, e.g.*, Declan McCullagh, *Feds Seek Wiretap Access Via VoIP* (Jan. 8, 2004), <http://news.com.com/2100-7352_3-5137344.html?tag=prntfr>.

The Commission should conclude that the Free World Dialup and DigitalVoice services are jurisdictionally interstate and thereby preclude state regulation of these services. In addition, the Commission should make clear that interstate access charges apply only where and to the extent that these calls travel on the public switched telephone network. The Commission should not, however, classify the services at issue here as "information services."

Sincerely,

Kathleen Grillo

cc: Chairman Michael Powell
Commissioner Kathleen Abernathy
Commissioner Michael Copps
Commissioner Kevin Martin
Commissioner Jonathan Adelstein
Bryan Tramont
Christopher Libertelli
Jon Cody
Matthew Brill
Jessica Rosenworcel
Daniel Gonzalez
Lisa Zaina
William Maher
John Rogovin
Jeffrey Dygert
John Stanley
Paul Garnett
Joshua Swift
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